No. 00-1241

Supreme Court, U.S.
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In The

Supreme Court of the United States

SAMUEL LEWIS, former Director of the Arizona Department of Corrections, in his official and individual capacities; et al.,

Petitioners,

v.

DENNIS JOHNSON, et al.,

Respondents.

TERRY STEWART, Director of the Arizona Department of Corrections, in his official and individual capacities; et al.,

Petitioners,

v.

LEROY BACA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JANET NAPOLITANO
Arizona Attorney General

THOMAS J. DENNIS*
BRUCE L. SKOLNIK
Assistant Attorneys General
1275 W. Washington
Phoenix, Arizona 85007-2926
(602) 542-3333
Counsel for the Petitioners

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. THE COURT OF APPEALS DID NOT BASE ITS DECISION "SOLELY ON PROCEDURAL GROUNDS," BUT SQUARELY DECIDED WHAT STANDARD MUST BE APPLIED TO THE SUBJECTIVE PRONG OF THE EIGHTH AMENDMENT CLAIM IN THIS CASE.

This Court should reject Respondents' attempt to avoid this Court's review by suggesting that the majority opinion below was based solely on a procedural ground concerning the weight to the given videotape evidence on summary judgment. This argument ignores that, before reaching such factual matters, the courts below were first required to identify the legal standard against which the facts would be applied. Petitioners are not seeking review for the reason that the Ninth Circuit incorrectly applied the facts by failing to give adequate credence to a videotape.

Rather, review is sought because, on the subjective prong of Respondents' Eighth Amendment claim, the Ninth Circuit squarely and erroneously decided to apply the legal standard created by this Court to adjudicate normal prison conditions in *Estelle v. Gamble*, 429 U.S. 97 (1976). Instead, the Ninth Circuit should have applied nothing less than the full measure of deference this Court held prison officials are entitled to in *Whitley v. Albers*, 475 U.S. 312 (1986), when they are forced to maintain security in the aftermath of an extraordinary prison disturbance. Had the court of appeals applied the correct law, it would have affirmed the trial court's determination that the Petitioner prison officials were entitled to summary judgment.

This Court should also reject Respondents' unstated implication that the Ninth Circuit's decision on the subjective standard was unnecessary dicta and therefore beyond this Court's review at this time. The Ninth Circuit had before it an appeal from a grant of summary judgment on an Eighth Amendment claim that consisted of two elements – objective and subjective. It is now well established that on appeal from a summary judgment, an appellate court may reach any possible ground to affirm, even though the district court did not address the question. *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.2d 1141, 1154 (9th Cir. 2000) (a case may be affirmed on any ground supported by the record. "Where precisely the same result could have been reached on other grounds apparent from the record, sending the case back to the district court is wasteful both for the courts and for the litigants. *See also SEC v. Chenery*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943)."). *See also* 10A Charles Alan Wright, et al., *Federal Practice and Procedure Civil* § 2716, at 290 (3d ed. 1998).

Here, the district court clearly determined that, in adjudicating the post-riot actions of the Petitioner prison officials, the heightened *Whitley* test governed the subjective element. Appendix to Petition for Writ of Certiorari (App.) at 27-28, 38-40. The district court spent considerable time explaining its reasoning, but ultimately concluded it did not need to apply the *Whitley* standard because Respondents' allegations were not objectively serious enough to state an Eighth Amendment claim. Nevertheless, the district court made clear its belief that a *Whitley*-type standard controlled.

In reversing the district court's grant of summary judgment, the court of appeals determined that the Respondents had adduced sufficient evidence on both the subjective and objective elements of their Eighth Amendment claim. The analysis by the court of appeals concerning application of the *Whitley* standard to the subjective element was not mere dicta, but instead was essential to its holding that the district court erred in granting summary judgment. Had the court of appeals agreed with the district court that the *Whitley* standard applied, it would have affirmed the district court's decision on that alternate basis.

The court of appeals' resolution of this issue, therefore, was not merely careless surplusage unworthy of this Court's consideration. *See Patel v. Sun Co., Inc.*, 141 F.3d 447, 462 (3rd Cir. 1998) (defining dictum as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding – that, being peripheral, may not have received the full and careful attention of the court that uttered it.") (quoting *Sarnoff v. American Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986)). Thus, pursuant to established principle, the court of appeals necessarily addressed a potentially dispositive issue that had been fully determined by the district court and argued by the parties on appeal.

Indeed, the inmates' Opening Brief in the Ninth Circuit made a point of separately challenging the district court's decision concerning the subjective component of the Eighth Amendment claim. One of Respondents' arguments was that prison officials' actions "fell outside the wide-ranging grant of deference that should normally be

afforded to prison officials when reviewing action purportedly taken to preserve internal order and discipline." *Baca v. Stewart*, 9th Cir. No. 98-16851, Respondents' Opening Brief at 23. Respondents argued alternatively that they satisfied the evidentiary standard articulated by *Whitley*, or that the district court misinterpreted and misapplied *Whitley*. Respondents' Opening Brief at 24-27. Conversely, in their Answering Brief, Petitioners argued specifically and at length that *Whitley* controlled the decision in this case. *Baca v. Stewart*, 9th Cir. No. 98-16851, Petitioners' Answering Brief at 13-20. It should come as no surprise, therefore, that the Ninth Circuit Court of Appeals addressed an issue that was both squarely dealt with by the district court below and fully argued by the parties on appeal. To have done otherwise would have been both wasteful and contrary to appellate practice in summary judgment cases.

There can be no legitimate argument on this point – application of *Whitley* to the post-riot facts presented by these cases was both argued by the parties and squarely decided by the Ninth Circuit. Thus, Respondents cannot escape the fact that the Ninth Circuit panel chose to decide the question of the correct subjective standard and its ruling – that the Petitioner prison officials were not entitled to deference during the period when they were trying to identify and segregate riot participants to prevent an almost certain reignition in hostilities – is now the law of the case which the district court will be required to follow on remand. As in the Ninth Circuit, it would be wasteful for this matter to be remanded to the district court for a full trial using an incorrect legal standard.

II. THE COURT OF APPEALS INCORRECTLY APPLIED *WHITLEY*.

Respondents barely address the merits. They ignore that the Ninth Circuit's decision conflicts with this Court's admonition in *Whitley* that deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to "prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline." 475 U.S at 322. Respondents ignore that the Ninth Circuit's decision conflicts with this Court's admonition in *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992), that the *Whitley* standard applies to both riots and "lesser" disruptions where corrections officers must balance the need to maintain or restore discipline against the risk of injury to others. Respondents ignore the conflict between the Ninth Circuit's decision here, its own prior decision, and decisions from other courts throughout the country. Finally, as Circuit Judge Sneed stated in his dissenting opinion below:

> The majority simply ignores the constraints the prison officials were faced with and presumes that conditions should have been normal the moment the officials "were able successfully to remove the prisoners from the buildings and secure them in the prison yard." Maj. Op. 734. This approach is unrealistic because it improperly holds the prison officials to a standard of conduct that will be difficult for them to meet.

App. at 22.

Application of *Whitley* is required in this case to give prison officials the level of deference required by the emergency situations they faced. This Court should grant certiorari and reverse the court of appeals' decision supplanting its judgment for that of Arizona's prison officials.

Respectfully submitted,

JANET NAPOLITANO
Attorney General

THOMAS J. DENNIS*
BRUCE L. SKOLNIK
Assistant Attorneys General
1275 W. Washington
Phoenix, Arizona 85007-2926
(602) 542-3333
Counsel for the Petitioners

**Counsel of Record*

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